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THE BELGIAN TELECOMMUNICATION CASE

Between Past and Future

1. The Belgian Telecommunication case is between a well known Past and an uncertain Future. Therefore, any comment about our national situation is quite difficult. It has to take into account both a past regulation still available and some expected legislative modifications which will deeply modify the present legal framework.

As I am speaking before the Minister, I would like to ask you to differ your questions about these expected new regulations till the next week.

2. My speech aims firstly to describe the present situation ; secondly to examine that situation at the light of the expected legislative reforms in sofar as we have some knowledge thereabout ; thirdly to analyse the conformity of the present and future framework with the European one that is to say, mainly:

- the directive on competition in the market for terminal equipment ;
- the draft Commission directive on competition in the market for telecommunications services ;
- the proposal for a Council directive on the establishment of the internal Market for telecommunications services through the implementation of O.N.P.

3. Before that, we want briefly to present the legal basis of the "past" but still actual framework and of what we call : the next future framework.

The "former" framework is characterised by a classical approach :
- strong state monopoly with exclusive rights ;
- confusion between regulatory and operating functions .

It stems out different texts, mainly :
- Law of october 13 th 1930 about telegraph and telephone ;
- Law of July 13 th 1930 creating the R.T.T. ;
- Law of November 15 th 1933 on operating of telegraph and telephones lines.

and more recently.
- Decree of the Minister on tariffs and conditions for using and connecting terminal equipments dated from september 20 th 1978 . I would like to add some comments about the legality of this text. In fact, a lot of important limits to the freedom of using or connecting terminals and leased lines are imposed by the decree. The legal basis for such limitations is uncertain and seems to be inadequate. The Law of 193O allows the Minister only to decide on tariffs. The question of tle legality of the decree has been put in the context of a recent decision on the sale of terminal equipment by a super market . In the case, the R.T.T. had forbidden the sale referring to the above mentionned decree which requests a prior approval for the sale and connection of the terminal equipment by the R.T.T..

- Law of september 7 th 1984 about the possible creation by R.T.T of subsidiairies and joint ventures with private undertakings

4. As regards the future, some proposals are for the moment discussed by the Government. Definitively, the "wise Men Report" submitted by a group of experts to Mme P. D'Hondt , formerly minister of telecommunications, has prepared the way to the texts which are presently discussed and are largely distributed now. Two texts must be taken into account :
- firstly, the draft on "Telecommunications and Belgacom creation";
- secondly, the draft on a legislation reform of the status of certain public undertakings . According to a government decision, the priority is given to the second text .

5. For the analysis of these different national and european texts, the following plan is proposed:
- firstly, certain considerations will be made on the status of the main actor;
- secondly, we will analyse the different provisions in respect to the basic network, the service and the terminal equipment.

Finally, conclusions will be drawn to evaluate the Belgian past and future legal framework.

Chapter I : Status of the main actor

6. In respect to this question, one should compare the present situation derived from the law of 1930 creating the RTT with the proposed status to be given to "Belgacom", tentatively the new name for the RTT. We propose a systematic comparison about three topics :

- The legal status of the public undertaking ;
- The scope of its activities;
- The freedom of action for the undertaking;

I. Legal Status

7. In respect to the first topic, telecommunication services are provided mainly by the Regie des Telegraphes et des Telephones, which is a public undertaking with a specific status under public law with specific duties . The draft bills presently discussed intend to allow to this undertaking to adopt a limited liability company status under commercial law even if the undertaking remains wholly state owned and keep some missions of public interests .

8. In 1984, the RTT was allowed to act as a public holding company with the right to create private telecommunication firms jointly with private companies. This allowance needs a special governmental authorization by Royal Decree (e.g. the creation of Betelcom (July 9 th 1986)) and the RTT must keep the majority of the shares if the activities of the subsidiary

concern the basic network. The system outlined in the draft bill above mentioned allows for more flexibility although the authorization of the minister is still required in the draft bill on telecommunications (but not in the draft bill on Public undertakings) .

9. In respect to the liabilities occurred by the public undertaking for its activities, whereas pursuant art. 17 of the law of 1930 is provided a regime of non liability, the Draft bill on telecommunications establishes a regime of limited liability (art. 117 et s.) at least for the activities under monopoly. A maximal amount will be fixed by Royal Decree .

II. The scope of the activities of the RTT

10. The activities of the RTT are very broadly defined by the law July 19 th 1930, (art. 1) "RTT carries on, in the common interest, the telegraph and telephone services by wired or wireless networks " ; furthermore, the RTT is also allowed "to develop activities in relation with installation or operation of private equipment". As regards the second activity, it was expected in 1930 this activity will be operated in a competitive way . The expected bill on telecommunication enlarges once more this scope :"The Object of Belgacom includes all activities, directly or indirectly, in relation with telecommunication" (art. 76), for instance Belgacom will be allowed to furnish all telecommunications services, including consultancy services, E.F.T. services, electronic information services, etc.

11. As seen later, two kinds of activities are foreseen and distinguished in the draft Bill : on one side, what the Draft bill on telecommunications calls "the public telecommunications", for which special and exclusive rights are granted to the public undertaking. On the other side, the activities provided by the public undertaking in competition with other undertakings. Cross subsidiations between these two kinds of activities are prohibited and the PTT or Belgacom will be obliged to keep separate financial records of monopoly-based operations. Unfortunately, no analytical accountability is required from the public undertaking . Now, it is obvious that without this analytical accountability, it would be difficult to detect cross-subsidiations .

III. The "autonomy" of RTT

12. Under the law of 1930, the RTT is under the direct control, i. e. management of the Minister or the Secretary of State, responsible for telegraph and telephone ; its budget is controlled by the Parliament ; the RTT is submitted to the Act on Public works, Procurement and Services contracts and finally the telecommunications tariffs are directly decided by the Minister. To summarize, the activities of RTT are presently characterized by a lack of autonomy.

13. The proposed regulatory framework is intricate . We want however to underline some discrepancies between the two draft bills. If the two draft bills now in discussion aim to give more autonomy to the RTT or to the

future Belgacom, the Draft bill on telecommunications maintains a very important power of control and indirectly of management to the Minister of Telecommunications. From this point of view, if examined at the light of the recommandation given by the European community to separate very clearly the regulatory and operating functions, certain provisions of the draft bill on Telecommunications are in my opinion questionable.Indeed if the Minister of Telecommunications remains indirectly the "boss" of the R.T.T.and in the same time keeps certain regulatory functions, i am afraid that the distinction between regulatory and operating functions would be insufficiently clear ...

In fact, the autonomy of RTT is although increased but remains still limited. The management by administrators nominated by Royal Decree is in principle independant but in the draft bill on Telecommunications, the members of the executive Board are directly nominated and revoked by the Minister. Furthermore the two bills allow for a control by a Government delegate. Afterwards, the public undertaking is submitted partly to the Act on Public Procurement at least in the Draft bill on public undertakings but not in the Draft bill on Telecommunications (article 110 §2).

14. In the system proposed by the draft bill on Public undertaking, a "contrat de gestion" (Board Statement) would be concluded between the Management Board and the Minister in order firstly to define the scope of the public services activities of the public undertaking, secondly, the

quality and the tariffs of these services, thirdly, the financial means necessary to operate them and finally, the penalties in case of non respect of the provisions of this management agreement. Thus, it seems that the principles of O.N.P. will be implemented through this way .

15. The draft bill on telecommunications enlarges the power of the Minister . The Board Statement includes the full scope of activities of the public undertaking (article 91). The tariffs structures are still imposed by the Minister, who approves also the budget and controls the external financial means of the undertaking . In case of public interest, the Minister can require a modification of the content of the Board Statement .

Chapter II : The Telecommunication regulation

16. The following plan will be followed :

- firstly, we will analyse the regulation on the different basic networks;
- secondly, the provisions on telecommunication services, will be examined;
- finally, the questions raised by provision and installation of terminals equipments will be studied.

A. The basic networks

17. Different classifications of networks can be envisaged. So, in respect to the technical means of transmission on one hand, the transmissions can be operated by wire and wireless (cellular mobile radio) . In the first category, one will find notally, the cable TV networks, the public networks like telephone or data transmission networks including the future ISDN. On the other hand, the transmission can be operated in analogous or digitalized modes . Later, a classification as regards the ownership of the basic Network will be envisaged. If most of the basic networks belong to the RTT, some are also private, belonging to administrations or to public undertakings (like the railway company) or finally to cable T.V. distributors.

18. The law of 1930 establishes a concession system and a legal monopoly for "the construction and exploitation of telegraph and telephone networks for the public correspondance". The scope of public basic network covered

by the monopoly is indirectly given by the definition of the private networks. The Art. 15 of the law of october 19 th 1930 states that a governmental authorization is required for the construction and use of a network not designated for third parties use, if such network either is constructed in or across public properties. Under Art. 3 of the Royal Decree of 1933, this authorization will be granted only if the sites to be connected belong to the same undertaking or to the same household.

19. The public Packet Switching Data transmission network (D.C.S) is considered by the government and by the PTT as a basic public telecommunications service, to be provided under a state monopoly. The legal background to this monopoly, however, is rather cloudy, as the Telegraph and Telephone Act of 1930 does not contain any specific mention of data networks. The same remark can be made as regards the ISDN insofar as according to the present regulatory system, the monopoly on a basic network is defined by the telegraph and telephone networks operated for services of public correspondance. Now, it is obvious that the I.S.D.N. not only is not a telegraph and telephone network but also will permit a lot of applications , which are not covered by the terms "public correspondance".

20. To cope with these uncertainties, the draft bill proposes a broader definition of the public netwrk under monopoly. The definition includes the digitalized means of telecommunication : Public basic networks is defined as all the installations and equipments between connection points appointed to telecommunications and crossing any public properties (article

1 6°). The scope of the basic network covered by this definitions according to my opinion is too broad. It embraces most of the wireless basic networks and the TV cables . It is obvious that the intention of the Minister is not to extend the monopoly to such networks. That is why we ask for a more precise definition and would like that the new regulation specifies clearly their status.

21. Certain provisions on the private in-house and intra -company networks (Local Area Network) restrict (art. 3O) the principle of freedom (art. 29) to install or operate in-house networks . A individual licence given by a Minister not yet designated , likely the Minister of Economic Affairs under consistent opinion of the Minister of telecommunications is required 1. if the network is going beyond the limits of the property of a natural or legal person even if the site to be connected is located in the same building; 2. if the network is connected to the public basic network or services or to another private network.

The article 35 allows to refuse the granting of the licence if it is required by the public interest **especially if losses are occurred by Belgacom.** Finally, article 36 establishes that authorizations must be denied if Belgacom provides solutions technically equivalent even if these solutions are more expansive . A such provision extends the monopoly of the public undertaking in the field of L.A.N. and makes the future regulatory regime once more restrictive than the still existing one .

22. As regards the wireless network and TV cables although private basic

networks they are in fact both subject for the moment to considerable restrictions and submitted to strict control by the RTT. I would like to emphasize these two points.

Firstly, as regards TV cables, a recent law dated september 1987, provides that these cables are not allowed to be interconnected and especially are not permitted to offer new telecommunications services like telealarm - teleshopping except with authorization given by Royal Decree. The authority to control TV cables operations is granted by the law to the RTT.

23. The status of wireless communication is strictly regulated by various provisions, particularly by the law of July 30th 1979 on radio communication (see also the Royal Decree of october 15 th 1979). These law and Royal Decree forbid certain uses of the waves (e.g. to use for third parties, to connect the wave transmissions to the public network) and submit to ministerial authorization all utilization of the spectrum frequencies. A licence will also be denied if PTT is prepared to offer comparable facilities.

24. Finally, the RTT is also responsible for spectrum allocation entrusted to its Service National de contrôle du spectre des Frequences. It rules radio activities of private radio networks and sets technical standards for cable TV networks.

25. The competence of the RTT (or of the future Belgacom) both as such and as ministerial service to regulate the use of the private networks and to

forbid any competition from them, can be viewed as a clear infringement of a principle asserted by the Green Paper, that is to say the separation between regulatory and operating functions, principle already asserted in the Directive on Terminals equipment and the Draft Directive on services.

In our view, it is absolutely mandatory to create an common independant regulatory body for all the basic networks both private and public in order to list the services available on each and to set up the rules for interoperability and interconnection between the basic network. Authority to control the respect of these rules must also be given to this new body. This new body might be the Institute for Telecommunications settled up by the Draft bill on Telecommunications analysed infra .

B. The Telecommunication Services

The present regulatory system

26. It is usual to say that under the law of 1930, a monopoly on telegraph and telephone services has been granted to RTT. The assertion is not exactly true. To be more precise, the law of 1930 grants a monopoly on two given basic networks "for public correspondance" that is to say for operating interactive telecommunication services accessible to the public in general and not to closed users groups or specific categories of users. No legal provision establishes explicitely a monopoly on telegraph and telephone service. Although indiretly, the law of 1933 forbids private

networks to offer services of public communication like telex, telegraph or telephone services.

It is obvious that ,then, the only telecommunication services that could be offered were such services. With the new techniques combining computer and telecommunication, several new telecommunication services could now be offered such as protocol conversion, time-sharing services information services, videotex services, etc ... Of course, not all these services could be considered as public communication services, either because they are closed users groups services or because by their nature, they are reserved for professional uses.

27. Thus, in principle, under the laws of 1930 and 1933, there is no legal restriction for a private company to offer non public communication services, of course on the public infrastructure as explained in point A. Such services could be offered either by the switched telephone network, by the DCS or by leased lines. As the tariffs for leased lines are attractive and thus to prevent "cream skimming", i. e. the offering of enhanced telecommunications services by these leased lines, a decree of the Minister in 1978 (september 20 th) submit the use of leased circuits to very strict conditions. As an example art. 86 provides that in principle, except with special authorization by the RTT, a leased line can only be used for the own use of a company (intra company use). So, the permission of the director general of the PTT is required for the provision in any manner of a leased telephone circuit to third parties. Subleasing and resale are forbidden to prevent the share of a leased circuit by several corporate users and a

permanent connection between a leased circuit and the public telephone may not be established unless expressely permitted by the RTT.

28. However, certain authorizations have been granted. So far, EARN, SWIFT, and SITA have received authorizations but the RTT have obtained for these networks a volume related tariff either on a voluntary basis, or by imposing the routing of the messages via DCS network. It is well known that, very recently, GEISCO has introduced a claim before the European Commission against RTT, for abuse of dominant position. It is clear that the confusion between the regulatory and the operating functions will be the main argument to establish this dominant position.

The expected regulatory system

30. The current legislative debate on the scope of the monopoly of the RTT on telecommunication services attempts to give clearer solutions to the problem. In the Draft bill on telecommunications three main principles are exposed :

1. a clear distinction between the telecommunications services supplied with exclusive rights by the public undertaking and those offered in competition (a) ;

2. the establishment of new regulatory body reporting directly probably to the Minister of economic Affairs in order to fix the rules and monitor their applications in the field of non reserved services(b) ;

3. conditions for the use of leased circuits (c) ;

a. The distinction between reserved services (under monopoly) and non reserved services(in free competition)

31. Special and exclusive rights are granted to the future Belgacom to provide the basic services defined as "Services regarding **mainly** the direct transportation of data between termination points". The Draft bill enumerates explicitely these basic services to be rendered by Belgacom :
- telephone services including mobile voice telecommunications and the exploitation of public phone booths ;
- telex services ;
- data transmission including mobile services.

The basic service obligation includes international telephone, telex and data transmission services. It equally embraces several accessory services, such as the establishment of connections to the infrastructure, the routing, short term information storage for communications purposes (e. g. in the packet switching network), publication of telephone directories, billing and bill collection (art. 18 and 19). Finally, certain telecommunications services of public utility (such as, telealarm services for old people) may also be reserved by exclusive rights to the RTT, as a result of a decision of the Minister of telecommunications .

32. All the others services called enhanced services may be freely operated

in competition by both private undertakings and Belgacom. Although, various restrictions are still provided. For instance, the private operators must use the public network in order to provide non reserved services and the object of these services may not be "**essentially** the direct transportation of voice, texts and data". Supplementary conditions fixed by special authorization delivered by both the Minister of Economic Affairs and the Minister of Telecommunications (art. 14) are foreseen when the non reserved services are offered to third parties and when they are carried out through leased lines (art. 24). I would add that authority for controlling the respect of these conditions is granted especially to executives of RTT or Belgacom(art. 66).

33. I would like to make three remarks in respect of the system built up by the Draft bill :

- firstly, the list of reserved services is extensive and in absolute contradiction with the Draft directive on competition in the markets for Telecommunications services. From this document, one may conclude that only a voice telephone service monopoly would be acceptable. The argument given by the Minister to have taken again the same list than the one established by the Dutch regulation is not convincing. The belgian draft bill frozes the list by a legislative measure not easily modifiable while the dutch list may be modified by a simple government ordinance.

- a second contradiction with the Draft european directive must be underlined : the competence granted to Belgacom to monitor the activities of its competitors enables it to prevent or restrict access to the market for

the non reserved telecommunication services by these competitors.

- finally, it is regrettable that the Draft bill on one hand does not restrict to minimal conditions (like no harm to the network, requirements of Data protection, implementation of international standards) the granting of a licence and, on the other hand does not entrust to a really independant authority such as the Institute not in part but also all regulatory tasks and administrative powers concerning the non reserved services.

b. the Creation of a Telecommunications Institute

34. In order to implement the required distinction between regulatory and operating tasks, the Draft bill creates an Institute, entrusted for regulating, licensing and monitoring in the field of non reserved services, private installations and terminal equipments (art. 10). At this stage, only the questions related to the problem of non reserved services will be analyzed. The institute is an administrative Board depending from another Minister, probably the Minister of economic Affairs (art. 9). The individual authorizations contain prescriptions about technical requirements, connections to the public basic network or to another non reserved service and, finally, restrictions in order to protect public (economic or social) interest (art. 26). An authorization may be denied if harms are caused to the public undertaking Belgacom or considering the specific vocation of Belgacom to offer public telecommunications services.

Unfortunately, nothing is said about the proceedings before the Institute

and the rules to be followed in order to obtain the authorization of the Institute or the Ministry.

35. To conclude on this point, it is important to underline that

1) the Institute has nothing to say about non reserved services and the public basic network. It is regrettable that this independant administrative body does not have an overall competence on whole telecommunication sector. Nothing is said about the eventual competence of the Institute to solve litigations between competitors. The commission for litigations settled up by the draft bill on telecommunications is competent only to solve litigations between Belgacom and its customers.

2) the partition of the ministerial responsabilities between two Ministers is also detrimental for a coherent approach of the rules available in the telecommunication sector. It is obvious that the Minister of Telecommunications keep indirectly full control of the activities of Belgacom and is mainly responsible for ruling the activities of Belgacom concerning the basic network and the public telecommunications services without possible interference of the Minister of Economic Affairs. On the contrary, some interferences from the Minister of Telecommunications are still practicable for the competitive sector insofar the decision of the Minister of Economic Affairs depends in most of the cases from a conform opinion of this Minister.

c. Conditions for the use of leased lines

36. Several conditions for the use of leased lines will still be necessary. For instance the obligation to furnish "permanent connection" to any interested party is provide. The connection of leased lines to the public infrastructure will be submitted to conditions fixed by the Ministry of telecommunications (art. 22). In addition, two kinds of agreements must be concluded with Belgacom. The first category applies to leased lines for internal use or for use with one third party designated in the agreement ; the other one, subject to authorization by the two Ministers and relates to leased lines allowing the offer of non reserved services to third parties (art. 21).

Finally, according to the draft bill, supplementary charges may be requested to be paid to Belgacom. These charges fixed by Royal Decree, are due if the leased lines and connected to the public network or used by third parties (art. 62). We want to underline that these charges have especially to cover the losses of earnings incurred by Belgacom from the bypassing of its network. This last provision, at our opinion, is strictly in contradiction with the draft Directives on O.N.P. and on Telecommunications services which clainm for cost oriented tariffs .

C. The terminal equipment

a. The present regulatory system

37. With respect to terminal equipment attached to the public networks, it is necessary to distinguish the problems related to their procurement and those related to their connection and maintenance.
Till a few years ago, the PTT enjoys a monopole on the procurement of terminals including modems. Interestingly enough, except in a few determined cases no legal basis justified that monopoly. Consequently, the supply by private operators of terminal equipments was authorized in certain cases as it is showed the attached synotic tables.
38. However, this furnishment is authorized by the RTT after an individual testing or type approval procedure. The equipment proposed must comply to the technical requirements expressed most frequently by international organizations and is tested for any potentiality to cause interference, the integrity of the public network and with respect to technical quality ,the compatibility and interoperability.

39. In addition, art. 13 of the Ministerial decree of 1978 prohibits the rearrangement of a network connection and the attachment of equipment by private operators, except with special authorization of the RTT and, therefore, grants to the RTT a monopoly on the installation and maintenance of terminal equipment.
In a recent case (July 31 th, 1986), the President of the Tribunal of Brussel

has ruled that even if the RTT has no monopoly, the simple fact that RTT is both player and referee insofar the RTT enjoys standard setting powers and the right to control effectively their application, constitutes a major and serious risk for the RTT to abuse of its dominant position. In the case, the RTT had concluded an agreement of exclusive distribution of PBX with a private company. This agreement was deemed as void. A such decision claims very clearly a distinction between the regulatory role which has to be granted to an administrative body and the commercial role of the RTT. This decision anticipates the directive of the commission on the free competition in the market of terminal equipments, unfortunately disputed by the Belgian government.

b. The expected situation

40. To implement the european directive already mentioned, the draft bill on Telecommunication provides :

- firstly, the unrestricted provision of terminal equipment (art. 42)
- secondly, that all terminal equipments must be approved in order to be connected with the public network and a clear reference to the approval must be indicated on the terminal equipment itself and on its advertisement (art. 48).
- thirdly, that the approval is delivered by the Institute after a conformity testing by an independant and recognized laboratory. It was foreseen in a previous version of the Draft Bill that Belgacom enjoys the possibility to monitor certain terminal equipments. This last provision would have been

definitively in contradiction with the european directive.

Conclusions

41. The Belgian Telecommunication landscape is expected to take a new look and the Belgian RTT ,to start a new life. In this conclusion, we intend to point out the main characteristics of this new landscape :

a. It is obvious that the Draft bills presently in discussion endeavours to **separate the regulatory activities and bodies (the National Telecommunications Institute and the two Ministers) from the operating functions provided both by private operators and the public operator.**

Despite this will, it is pitful that some ambiguities are subsisting. Certain monitoring activities are still devoted to the public undertaking and the Minister of Telecommunications appears more as the manager of the public undertaking (for example he nominates the executive Board) than the real arbitrator in the whole field of telecommunication sector. At my opinion, are equally significant and desastrous the facts that the Institute and the Minister of Economic Affairs have no competence to rule in the sector of the reserved services and that the quality, the evolution and the tariffs of the public basic network services including the applications of O.N.P. principles are depending only either from decisions taken by the Minister of telecommunications, either from the provisions of the Board Statement concluded between this Minister and the public undertaking.

42. b. **The monopoly granted to the public undertaking on the telephone basic network has justified a lot of restrictions to the**

use of other basic network such as private owned basic network cable TV distribution or wireless networks and the expected bill on Telecommunication does not modify this situation. On the contraryin certain cases like the field of L.A.N. , the position of the public undertaking is improved.

43. c. With respect to the services, the monopoly of the RTT has been progressively extended indirectly by different restrictive rules on the use of the leased lines.

We have denoted that the draft bill proposes a clear distinction between reserved services and services in free competition. Notwithstanding that, have been criticized :

- the extensive list of reserved list, not easily modifiable ;
- the requirement of obtaining a licence to offer non reserved services ;
- certain still remaining conditions (including tariffs conditions) for providing services by leased lines or for connecting these leased lines to the public network.

44. d. Finally, it seems that the restrictions of conditions for the procurement and installation will be abolished after the european directive on the competition on the terminal equipment market.

The Telecommunication sector is rapidly growing and moving. It is sure that its development in each country greatly from the

regulatory environment. It is sure the decision of companies, more and more depending from telecommunications, to install themselves in a country rather than in an other one will take into account especially a comparison between their regulatory environments. At this point of view, Belgian has not taken the good way and the real opportunities that its geographical and political situations justified.